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Enforcement of Restrictive Covenants In Pennsylvania Employment Contracts

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COMMENTS

Enforcement of Restrictive Covenants In Pennsylvania Employment Contracts

I. Introduction

In the absence of a contrary agreement between employer and employee, the law does not prevent an ex-employee from competing in business with his former employer.[1] Restrictive covenants often are included in employment contracts, however, to prevent ex-employees from engaging in competition with their former employers,[2] to prohibit divulgence of trade secrets,[3] and to prevent solicitation of their ex-employers' customers.

This comment first examines the historical development of restrictive covenants in Pennsylvania employment contracts. Next, the current requirements for legal enforceability are examined. Finally, the remedies available to employers upon breach of the restraints are explored.

II. Prerequisites to Enforcement of Restrictive Covenants

Consistent with the belief that a man has a right "to engage in a lawful business anywhere and at any time,"[4] early common law held any restriction on an ex-employee's competing with his former employer to be an illegal restraint of trade and, therefore, unenforcea-

1. Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 626, 136 A.2d 838, 844 (1957).

2. *See* notes 15-128 and accompanying text *infra*.

3. Although the scope of this comment is limited to covenants not to compete, a covenant not to use or divulge trade secrets usually accompanies a covenant not to compete. Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 314 A.2d 287 (1974). In this area Pennsylvania still adheres to the *Macbeth-Evans* rule that prohibits divulgence of trade secrets obtained in the course of a confidential relationship. Macbeth-Evans Glass Co. v. Schnelbach, 239 Pa. 76, 85-86, 86 A. 688, 690 (1913). Included in this category of trade secrets are customer lists, customer information, and customer contracts. *Compare* Alexander & Alexander, Inc. v. Drayton, 378 F. Supp. 824 (E.D. Pa. 1974) (customer lists, lists of policy expiration dates held confidential); Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 314 A.2d 296 (1974) (customer lists of temporary help held confidential); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957), *with* Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 314 A.2d 287 (1974) (general information not confidential).

4. General Office Equip. Corp. v. Sampson, 90 Pitts. L.J. 179, 189 (Pa. C.P. Alleg. 1941).

ble.[5] As part of the development of modern commercial law, however, courts gradually adopted the position that covenants not to compete were both permissible and enforceable under certain circumstances.[6] In the late nineteenth century, Pennsylvania courts began to distinguish between contracts in general restraint of trade[7] and those in partial restraint.[8] This classification separated restrictive agreements that covered the entire country, which were general restraints and void, from those that covered only a small area.[9] For a covenant to be valid, it had to be founded on valuable consideration, be reasonable, and impose no general restraint on trade or industry.[10] This rule, which looked to the nature and effect of the restriction as well as its scope, was a flexible substitute for the original position that all contracts in restraint of trade were necessarily void.[11] Pennsylvania courts have continued to use this test, in which the critical issue is whether the contract is a reasonable or unreasonable restraint of trade.[12] If reasonable, the restriction is valid.[13] Pennsylvania decisions continue to declare, however, that employment restrictions are to be strictly construed against the employer because they contravene

5. The earliest cases were decided against the economic background of a chronic shortage of skilled workers in England, the result of a virulent epidemic during the fourteenth century. All restrictive covenants, therefore, were held void. This policy carried over into the early seventeenth century when grants of trading privileges by the sovereign caused widespread public indignation that broadened into a dislike for all restraints on free trade. *See* The Dyer's Case, Y.B. 2 Hen. 5, pl. 26 (1415).

6. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 331, 314 A.2d 279, 281 (1974) (Jones, C.J., concurring). *See generally* Carpenter, *Validity of Contracts Not To Compete*, 76 U. PA. L. REV. 244 (1928).

7. Henschke v. Moore, 257 Pa. 196, 101 A. 308 (1917); Pittsburgh Stove & Range Co. v. Pittsburgh Stove Co., 208 Pa. 37, 57 A. 77 (1904); Cooper v. Edeburn, 198 Pa. 229, 47 A. 1116 (1901); Cleaver v. Lenhart, 182 Pa. 285, 37 A. 811 (1897); Patterson v. Glassmire, 166 Pa. 230, 31 A. 40 (1895); Kelso v. Reid, 145 Pa. 606, 23 A. 323 (1892); Appeal of Harkinson, 78 Pa. 196 (1875); Appeal of McClurg, 58 Pa. 51 (1868); Gompers v. Rochester, 56 Pa. 194 (1867); Keeler v. Taylor, 53 Pa. 467 (1866). The doctrine that a contract in general restraint of trade is void as against public policy rests on two principal grounds: (1) the injury to the public caused by the elimination of the restricted party's industry, and (2) the injury to the party precluded by contract from pursuing his occupation and, thus, prevented from supporting himself and his family. Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64, 66 (1873).

8. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088 (1904).

9. Henschke v. Moore, 257 Pa. 196, 200, 101 A. 308, 309 (1917).

10. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088 (1904).

11. Henschke v. Moore, 257 Pa. 196, 200, 101 A. 308, 309 (1917).

12. This position has been adopted by Pennsylvania through the adoption of RESTATEMENT OF CONTRACTS § 516(f) (1932):

> The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:
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> . . .
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> (f) A bargain by an assistant, servant or agent not to compete with his employer or principal, during the term of employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

13. Henschke v. Moore, 257 Pa. 196, 200-01, 101 A. 308, 309 (1917); Monon-

the common-law concept of free competition.[14] To be enforceable, a restrictive covenant must satisfy several requirements.[15] It must be ancillary to a contract of employment.[16] It also must be contained in a valid contract and supported by adequate consideration.[17] The restraint must be reasonably limited in duration and scope, necessary for the protection of the employer, and not an undue hardship on the employee.[18] Finally, while in the course of his employment, the employee must receive some specialized training or develop close personal contacts with the customers of the employer.[19] Although courts often treat these requirements as separate and distinct, they are closely interrelated and failure to satisfy one will often be a failure of another.[20]

A. Ancillary to an Employment Contract

It has long been the common-law rule that contracts in restraint of trade made independently of a contract of employment or sale of a business are void as against public policy regardless of the consideration exchanged therein.[21] Judge Taft, later the Chief Justice of the United States Supreme Court, aptly stated the rule in *United States v. Addyston Pipe & Steel Co.*:[22]

> Th[e] very statement of the rule implies that *the contract must be one in which there is a main purpose, to which the covenant*

gahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 293, 59 A. 1088, 1089 (1904).

14. General Office Equip. Corp. v. Sampson, 90 Pitts. L.J. 179 (Pa. C.P. Alleg. 1941).

15. Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967); Capital Bakers, Inc. v. Townsend, 426 Pa. 188, 231 A.2d 292 (1967); Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 206 A.2d 59 (1965); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957); Cleaver v. Lenhart, 182 Pa. 285, 37 A. 811 (1897); Gompers v. Rochester, 56 Pa. 194 (1867); Keller v. Taylor, 53 Pa. 467 (1866); Markson Bros. v. Redick, 164 Pa. Super. 499, 66 A.2d 218 (1949); *see* RESTATEMENT OF CONTRACTS § 515(e) (1932).

16. *See* notes 21-43 and accompanying text *infra*.

17. *See* notes 44-71 and accompanying text *infra*.

18. *See* notes 72-113 and accompanying text *infra*.

19. *See* notes 114-128 and accompanying text *infra*.

20. *See* Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 451, 235 A.2d 612, 619 (1962). For example, failure of consideration will often cause the restriction to fail as not ancillary to the taking of employment. *See* notes 28-33 and accompanying text *infra*.

21. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 331, 314 A.2d 279, 282 (1974) (Jones, C.J., concurring); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 447, 235 A.2d 612, 617 (1967); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 627, 136 A.2d 838, 845 (1957).

22. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 212 (1899).

> *in restraint is merely ancillary.* The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or employment of its fruits, he may suffer from the unrestrained competition of the other. . . . But where the sole object of both parties . . . is merely to restrain competition, . . . it would seem that there [is] nothing to justify or excuse the restraint . . . . There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, . . . but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.[23]

Although the covenant not to compete must be ancillary to a contract of employment,[24] it need not be executed simultaneously with the initial taking of employment.[25] In *Jacobson & Co. v. International Environment Corp.*[26] a restrictive covenant was executed two years after Kily accepted employment and was supported by adequate consideration. Kily sought to invalidate the restriction, claiming that it was not ancillary to his initial assumption of employment. The court found some merit in Kily's contention that an employee changes his position and an employer acquires leverage after the commencement of employment, but stated that usually no need exists to restrict competition from one hired as a novice. Only when a novice has developed expertise that could injure his employer if released competitively is the protection of a restrictive covenant desirable. The court concluded that it is "far better to allow the parties themselves, when they feel the employee's degree of skill warrants it, to decide when to insert a restrictive covenant."[27]

Pennsylvania courts have strictly construed the taking of employment.[28] Any hiatus between the execution of an employment contract or an agreement on its terms and the imposition of a restrictive covenant without a corresponding benefit or change in status[29]

23. *Id.* at 282-83 (emphasis added).

24. Cases cited note 15 *supra*; A.B.L. Liquidating Co. v. McCabe, 24 Bucks 109 (Pa. C.P. 1973); Reading Aviation Serv., Inc. v. Bertolet, 64 Berks 186 (Pa. C.P. 1972); Pennsylvania Higher Educ. Assist. Agency v. Layton, 59 Pa. D. & C.2d 270 (C.P. Dauph. 1972); Toensmeier v. Olsen, 85 York 154 (Pa. C.P. 1971); Cavanaugh v. U.S. Career Recruiters, Inc., 49 Pa. D. & C.2d 690 (C.P. Phila. 1970); L.J. Balfour Co. v. Burke, 118 Pitts. L.J. 372 (Pa. C.P. Alleg. 1970); Coyne Indus. Laundry, Inc. v. Shouck, 84 York 57 (Pa. C.P. 1970); Protect Alarms, Inc. v. Ernst, 48 Pa. D. & C.2d 413 (C.P. Leh. 1969); National Starch & Chem. Corp. v. Snyder, 34 Pa. D. & C.2d 533 (C.P. Phila. 1964); Randall v. Quetsch, 44 Wash. 204 (Pa. C.P. 1964); W.N.O.W., Inc. v. Barry, 77 York 174, 32 Pa. D. & C.2d 514 (C.P. 1963); Jack Tratenberg, Inc. v. Komoroff, 87 Pa. D. & C. 1 (C.P. Phila. 1951).

25. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 332, 314 A.2d 279, 282 (1974) (Jones, C.J., concurring); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 449-50, 235 A.2d 612, 618 (1967); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 629, 136 A.2d 838, 845 (1957).

26. 427 Pa. 439, 235 A.2d 612 (1967).

27. *Id.* at 450, 235 A.2d at 618.

28. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 314 A.2d 279 (1974).

29. *Id.*; Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967).

for the employee will render the restrictive covenant void as not ancillary to employment[30] and not supported by adequate consideration.[31]

Because of the five-month delay between the oral agreement to employ defendant and the imposition of a restrictive covenant, the Superior Court of Pennsylvania in *Markson Brothers v. Redick*[32] refused to enforce the restraint in the absence of a beneficial change in defendant's employment status. In *Beneficial Finance Co. v. Becker*,[33] however, the contract containing the restrictive covenant was signed by the employee two days after commencing work and was not binding until nine days later when it was accepted by the Beneficial Management Corporation in Newark, New Jersey. Nevertheless, the court held the contract ancillary to the taking of employment because a field supervisor had approved it for Becker's signature on the day he started to work. *Markson* and *Becker* are easily distinguished. In the latter case the contract was prepared on the employee's first day of work while in the former an entirely separate attempt was made by the employer to impose a covenant not anticipated by the employee when he accepted employment.

Another requirement is that of a *regular* employment relationship.[34] In *Morgan's Home Equipment Corp. v. Martucci*[35] plaintiff company purchased the assets of another company by which defend-

30. *Compare* Capital Bakers, Inc. v. Townsend, 426 Pa. 188, 231 A.2d 242 (1967) (twelve-year delay), *with* Beneficial Fin. Co. v. Becker, 422 Pa. 531, 222 A.2d 873 (1966). A hiatus between commencement of employment and imposition of a restrictive covenant also rendered the covenant void in Burroughs Corp. v. Cimakasky, 346 F. Supp. 1398 (E.D. Pa. 1972) (four-year delay); George W. Kistler, Inc. v. O'Brien, — Pa. —, 347 A.2d 311 (1975) (two-week delay); Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 314 A.2d 279 (1974) (one-year delay); Pennsylvania Funds Corp. v. Vogel, 399 Pa. 1, 159 A.2d 472 (1960) (three-year delay); Markson Bros. v. Redick, 164 Pa. Super. 499, 66 A.2d 218 (1949) (five-month delay); W.N.O.W., Inc. v. Barry, 77 York 174, 32 Pa. D. & C.2d 514 (C.P. 1963) (seven-day delay).

31. Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 449, 235 A.2d 612, 619 (1967). The issues of ancillary to the taking of employment and adequate consideration are intertwined. This is illustrated by the disagreement among the Justices in George W. Kistler, Inc. v. O'Brien, — Pa. —, 347 A.2d 311 (1975). Justice Nix felt the disputed covenant was invalid because it was not supported by adequate consideration while Chief Justice Jones and Justice Roberts felt it was invalid because it was not ancillary to the taking of employment.

32. 164 Pa. Super. 499, 66 A.2d 218 (1949).

33. 422 Pa. 531, 222 A.2d 873 (1966).

34. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 212 (1899); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957).

35. 390 Pa. 618, 136 A.2d 838 (1957).

ants had been employed. At an organizational meeting defendants were retained *provisionally* by the new employer. Four weeks later, upon plaintiff's offer of regular employment, defendants executed contracts containing restrictive covenants. In a subsequent suit on these covenants the court rejected defendants' contention that they were not ancillary to the taking of employment because the restrictions were not imposed at the time of provisional employment. Although the court did not explain its holding, no persuasive reason exists to allow an employer to impose restrictive covenants on employees hired provisionally. These employees will not learn the employer's business, are hired for only a short time, are unimportant to the business operation, and cannot be considered a competitive threat to the employer upon expiration of their employment term. For these reasons Pennsylvania courts have adhered consistently to the rule that "[a]s long as the restrictive covenants are an auxiliary part of the taking of *regular employment* and not an after-thought to impose additional restrictions on the unsuspecting employee, a contract of employment containing such covenants is . . . enforceable."[36]

Pennsylvania case law also requires that employment contracts containing restrictive covenants be executed by individual employees or their collective bargaining representative. In *Berks Packing Co. v. Landis*[37] defendant employee was a member of a union that through collective bargaining had agreed to a contract containing a restrictive covenant. The covenant prohibited member employees from selling meat products in competition with the employer for two years after leaving his employment. In an action to enforce the covenant, Landis asserted that the union was without authority under the Pennsylvania Labor Relations Act[38] to bargain on this subject. This Act provides that the union shall be the representative "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."[39] The court rejected Landis' argument, holding that the restrictive covenant was a condition of employment.[40] One persuasive element may have been that both the union and the employer considered the restriction a proper subject for the contract. Additionally, Landis was held to have sufficient actual or constructive knowledge of the covenant.[41] Thus, the employment contract was ancillary to the taking of employ-

36. Beneficial Fin. Co. v. Becker, 422 Pa. 531, 536, 222 A.2d 873, 876 (1966) (emphasis added).
37. 47 Pa. D. & C.2d 395 (C.P. Berks 1968).
38. PA. STAT. ANN. tit. 43, § 211.1-.13 (1964).
39. *Id.* at § 211.7(a).
40. 47 Pa. D. & C.2d at 399.
41. *Id.*

ment and not an afterthought designed to impose additional restrictions on an unsuspecting employee.[42]

In summary, for a restrictive covenant to be found ancillary to the taking of employment, the restriction must be contained in a contract for regular employment at the time the contract is agreed to by the employee or his union. Any hiatus between commencement of employment and imposition of the covenant without additional consideration[43] will render the covenant void.

B. Supported by Adequate Consideration

Another prerequisite for enforcement of a restrictive covenant is a valid contract. An offer and an acceptance, both established by the employment relationship,[44] must exist as well as consideration to support the covenant.[45] The first of two types of consideration that will support a restrictive covenant is illustrated by an initial employment contract. The consideration is the employment relationship itself because none existed previously.[46] The employee agrees that in return for the job he will abide by the terms of employment offered him.[47]

On the other hand, when a restrictive covenant is added to an existing employment relationship, regardless of whether the original contract was oral and terminable at will[48] or oral and binding for a specified term,[49] it is enforceable only if the employee receives a corresponding benefit or change in status.[50] The employee must be

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42. *Id.*; *see* note 36 and accompanying text *supra.*

43. *See* notes 28-33 and accompanying text *supra.*

44. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 339, 314 A.2d 279, 285 (1974) (Manderino, J., dissenting).

45. George W. Kistler, Inc. v. O'Brien, — Pa. —, —, 347 A.2d 311, 314 (1975); Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 330, 314 A.2d 279, 285 (1974).

46. Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 206 A.2d 59 (1965).

47. *Id.* at 225, 206 A.2d at 61.

48. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 314 A.2d 279 (1974); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967); Pennsylvania Funds Corp. v. Vogel, 399 Pa. 1, 159 A.2d 472 (1960); Markson Bros. v. Redick, 164 Pa. Super. 499, 66 A.2d 218 (1949).

49. W.N.O.W., Inc. v. Barry, 77 York 174, 32 Pa. D. & C.2d 514 (C.P. 1963).

50. Burroughs Corp. v. Cimakasky, 346 F. Supp. 1398 (E.D. Pa. 1972) (applying Pennsylvania law); Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 333, 314 A.2d 279, 282 (1974) (Jones, C.J., concurring); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 449, 235 A.2d 612, 618 (1967); Capital Bakers, Inc. v. Townsend, 426 Pa. 188, 231 A.2d 292 (1967); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967); Albee Homes, Inc. v. Caddie Homes, Inc., 417 Pa. 177, 207 A.2d

in a better position after the imposition of the restraint than he was before.[51] Such a beneficial change was apparent in *Jacobson & Co. v. International Environment Corp.*[52] The employee had been hired under an oral contract in 1957 that provided for a ten thousand dollar salary and contained no restrictive covenant. In 1959 the employee signed a written contract that contained a covenant not to compete with his employer for two years following termination of his employment. The 1959 contract, however, also changed the employee's compensation to a nine thousand dollar salary plus a share of the profits. The employee's earnings increased dramatically to a figure in excess of twenty-four thousand dollars in 1963. The modified compensation scheme was found to be adequate consideration for execution of the restrictive covenant.

Because of the inherently economic nature of the employee-employer relationship, courts search for some economic benefit to the employee when asked to enforce a restrictive covenant. In *Pennsylvania Funds Corp. v. Vogel*[53] the Supreme Court of Pennsylvania held that an employer's assumption of unemployment and social security taxes and contributions to an employee's pension plan constituted adequate consideration, even though the employee's termination of employment before the expiration of two years would have involved a forfeiture of pension rights. Adequate consideration has been found in the guaranty of an employee's stock option when no such guaranty was available before.[54] Similarly, a change from a noncommission compensation scheme to one including commissions and expense money has been held to be legally sufficient consideration.[55] Finally, in *Fatzinger v. DeLong*[56] sufficient economic benefit was found in a deferred cash payment of five hundred dollars to the employee. A gift of five shares of the corporation's stock was made by the employer to certain employees, subject to the condition that the stock be transferred back to the employer to be held in trust by him for five years. Upon termination of his employment an employee would receive five hundred dollars for his shares.

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768 (1965); Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 206 A.2d 59 (1965); Alabama Binder & Chem. Corp. v. Pennsylvania Indus. Chem. Corp., 410 Pa. 214, 189 A.2d 180 (1963); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957); Ross v. Houck, 184 Pa. Super. 448, 136 A.2d 160 (1957); Markson Bros. v. Redick, 164 Pa. Super. 199, 66 A.2d 218 (1949).

51. Markson Bros. v. Redick, 164 Pa. Super. 199, 66 A.2d 218 (1949).

52. 427 Pa. 439, 235 A.2d 612 (1967). The court also noted that a covenant's application to only voluntary terminations of employment and not dismissals will not affect the restriction's enforceability. *Id.* at 453, 235 A.2d at 620.

53. 399 Pa. 1, 159 A.2d 472 (1960).

54. Papercraft Corp. v. Prescher, 121 Pitts. L.J. 71 (Pa. C.P. Alleg. 1972).

55. M.S. Jacobs & Assoc., Inc. v. Duffley, 452 Pa. 143, 303 A.2d 921 (1973).

56. 10 Pa. D. & C.2d 53 (C.P. Leh. 1956).

Monetary benefit has been conspicuously absent from cases in which the courts have failed to find adequate consideration to support the subsequent imposition of a restrictive covenant.[57] For example, the addition of a provision requiring the employer to give notice before dismissing an employee is not in itself adequate consideration.[58] In *Jack Tratenberg, Inc. v. Komoroff*,[59] however, the court held that an agreement by the employer not to discharge without fifteen days' notice *coupled with* a two-dollar increase in car allowance was sufficient consideration to support a covenant prohibiting the employee from soliciting his employer's trade for six months after termination of his employment.[60]

A controversial issue is whether continued employment is adequate consideration for imposition of a restrictive covenant in a written contract for an indefinite term of employment when the initial contract contained no restrictive covenant and was oral and terminable at will. *Maintenance Specialties, Inc. v. Gottus*[61] illustrates the Pennsylvania position that continued employment alone is not adequate consideration.[62] Gottus was initially hired in 1968 pursuant to an oral contract terminable at will. On April 29, 1969, the parties entered into a written employment contract that included a covenant not to compete. Justice Pomeroy considered and rejected the argu-

57. *See* George W. Kistler, Inc. v. O'Brien, — Pa. —, 347 A.2d 311 (1975). A contract that is binding solely by reason of its being under seal will not be specifically enforced unless some performance constituting a fair exchange is a condition of defendant's duty. National Starch & Chem. Corp. v. Snyder, 34 Pa. D. & C.2d 533, 539 (C.P. Phila. 1964). Incorporation of the employer's business without other change does not abrogate contracts of employment or alter the parties' liability. Seligman & Latz v. Vernillo, 382 Pa. 161, 164, 114 A.2d 672, 673 (1955).

58. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 330 n.1, 314 A.2d 279, 281 n.1 (1974) (fifteen days); Capital Bakers, Inc. v. Townsend, 426 Pa. 188, 231 A.2d 292 (1967) (thirty days); Markson Bros. v. Redick, 164 Pa. Super. 499, 66 A.2d 218 (1949) (fifteen days). This was particularly true in *Maintenance*. The notice provision was illusory because the company could dispense with it at its virtually unlimited discretion.

59. 87 Pa. D. & C. 1 (C.P. Phila. 1951).

60. *Id.* at 8.

61. 455 Pa. 327, 314 A.2d 279 (1974).

62. *Id.* at 334-35, 314 A.2d at 283; *see* George W. Kistler, Inc. v. O'Brien, — Pa. —, —, 347 A.2d 311, 316 (1975); National Starch & Chem. Corp. v. Snyder, 34 Pa. D. & C.2d 533 (C.P. Phila. 1964); W.N.O.W., Inc. v. Barry, 77 York 174, 32 Pa. D. & C.2d 514 (C.P. 1963); Voss Mach. Co. v. Norris, 82 Pa. D. & C. 368 (C.P. Alleg. 1952); Consolidated Home Furn. Co. v. Getson, 80 Pa. D. & C. 488 (C.P. Phila. 1951). *Contra*, Cundiff v. Ertl, 47 Dauph. 440 (Pa. C.P. 1939) *Cundiff* is the only Pennsylvania case that holds that continued employment is sufficient consideration for a written contract containing a restrictive covenant executed after an initial oral contract without such a covenant. This case, although never specifically overruled, is contrary to the great weight of authority *supra*.

ment that since the initial contract was terminable at will, continued employment should be adequate consideration for the subsequent written contract.[63] Enforcement of a restrictive covenant in a *Gottus* situation could produce highly inequitable results. Most of the burdens an employer can impose, such as decreased compensation, longer hours, or increased duties, can be swiftly avoided by the employee if his employment contract is terminable at the will of either party. If, on the other hand, a contract remains terminable at will, but is augmented by a restrictive covenant supported only by formalization of the agreement into a writing,[64] the employee is saddled with a burden of which he cannot relieve himself by terminating his employment. In fact, an employee faced with the possibility of discharge may find it difficult to reject his employer's demand for a covenant. Yet, no change in the employee's status would occur, no financial benefit would exist, and no fair exchange for the restrictive covenant would have been made.[65] Therefore, a restrictive covenant based on such inadequate consideration falls far short of the requirements for enforceability established by the Supreme Court of Pennsylvania.[66]

This rule of law, however, is not without dissenters.

> If a restrictive covenant would be valid at the time an employee is first employed, I fail to see any logic to the prohibition against an employer requesting the same covenant subsequent to the employee's initial employment as a condition of continuing the employment [as long] as there is no claim . . . that the employee had an oral contract of employment for a specified term which was being altered or breached. . . . The question is whether consideration has been given since there was a pre-existing oral contract of employment which was terminable at will. In such circumstances the employee is not guaranteed continuing employment nor is the employer guaranteed the continued services of the employee. Either party may require any change in the terms of employment as a condition for continuing the employment relationship. The continued employment is the consideration supporting any new term requested by either party.[67]

Justice Manderino is correct in his assertion that the employer's

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63. 455 Pa. at 336, 314 A.2d at 284 (concurring opinion).
64. *Id.*
65. *Id.*
66. *See* notes 15-20 and accompanying text *supra.*
67. Maintenance Spec., Inc. v. Gottus, 455 Pa. 327, 337, 314 A.2d 279, 284-85 (1974) (Manderino & Roberts, JJ., dissenting). Justice Manderino also stated that the result would be different if the preexisting contract, oral or written, had not been terminable at will.

> Where the contract sets a definite term, were one party to increase the duty of the other without correspondingly giving a benefit to that party, the increased duty would not be enforceable. This is so because the consideration for the increased duty cannot be the continuing employment since both parties were already bound to continue the employment relationship for the term specified in the contract.

Id. at 339-40, 314 A.2d at 286.

interests are identical in both situations.[68] The majority view, however, which recognizes the employer's superior bargaining position after employment is commenced and the extremely inequitable results that could follow adoption of the minority position,[69] is the enlightened approach.[70]

For a restrictive covenant to be supported by adequate consideration in Pennsylvania, financial benefit must inure to the restricted employee either in the form of initial employment or, if the contract is executed subsequent to initial employment, by additional compensation. Pennsylvania is unlikely to recognize any abstract benefits, such as a promotion without a salary increase, as adequate consideration for a covenant not to compete.[71] Simply stated, the consideration must be measurable in dollars and cents.

C. Reasonable in Duration and Geographical Scope; Necessary for the Employer's Protection; Free from Undue Hardship on the Employee

Restrictive covenants in employment contracts are subject to more stringent standards of reasonableness[72] than are those contained in contracts for the sale of a business.[73] Employment covenants

68. *Id.* at 342, 314 A.2d at 287.

69. A number of jurisdictions have held continued employment to be sufficient consideration for a subsequent restrictive covenant. Tarrington Creamery v. Davenport, 126 Conn. 515, 12 A.2d 780 (1940); Raessler v. Burwell, 119 Conn. 289, 176 A. 126 (1934); Credit Rating Serv. v. Charlesworth, 126 N.J. Eq. 360, 8 A.2d 847 (1939); McAnally v. Person, 57 S.W.2d 945 (Tex. Civ. App. 1933). Similar covenants have been upheld in some cases without a discussion of consideration. City Ice & Fuel Co. v. McKee, 57 S.W.2d 443 (Mo. App. 1933); City Ice & Fuel Co. v. Snell, 57 S.W.2d 440 (Mo. App. 1933); Sarco Co. v. Gulliver, 3 N.J. Misc. 641, 129 A. 399 (1925); Eastman Kodak Co. v. Powers Film Prod., 189 App. Div. 556, 179 N.Y.S. 325 (1919); Stover v. Gamewell Fire Alarm Tel. Co., 164 App. Div. 155, 149 N.Y.S. 650 (1914).

70. *See* Consolidated Home Furn. Co. v. Getson, 80 Pa. D. & C. 488 (C.P. Phila. 1951) (new union contract is same as continued employment and alone is not adequate consideration).

71. In George W. Kistler, Inc. v. O'Brien, — Pa. —, 347 A.2d 311 (1975), the supreme court held that nominal consideration of one dollar, absent other factors, is not adequate consideration.

72. Cases cited note 15 *supra*; Boldt Mach. & Tool, Inc. v. Wallace, 56 Erie 93 (Pa. C.P. 1973); H. & R. Block v. Goss, 13 Lyc. 5 (Pa. C.P. 1972); L.G. Balfour Co. v. Burke, 118 Pitts. L.J. 372 (Pa. C.P. Alleg. 1970); Chambersburg Broadcasting Co. v. Foreman, 14 Cumb. 100 (Pa. C.P. Frank 1962); O'Reilly & White, Inc. v. Ferguson, 10 Chest. 556 (Pa. C.P. 1961); Jacobson & Co., Inc. v. Strauss, 77 Montg. 246 (Pa. C.P. 1960); Morefield v. Hassman, 74 Dauph. 241 (Pa. C.P. 1959); Penguin Ice Cream v. Shiner, 27 Leh. 342 (Pa. C.P. 1957); Keystone Sign Co. v. Trainor, 67 York 189 (Pa. C.P. 1954); RESTATEMENT OF CONTRACTS §§ 515(e), 516 (f) (1932).

73. Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 631-32, 136 A.2d

impose a greater hardship on an employee than upon a similarly restricted seller of a business.[74] The serious impediment an employee may face in his attempt to support himself and his family[75] and the community's deprivation of the employee's services and competition[76] are major concerns of the courts in construing covenants not to compete. Necessarily, reasonableness is a question of fact.[77]

1. Enforcement of the Restrictive Covenant as Written.—The recent case of *Bettinger v. Carl Berke Associates, Inc.*[78] illustrates the Pennsylvania approach to limitations on a restrictive covenant's duration and geographical scope. A rebuttable presumption exists that these restraints are legal. An employee relying on the defense of illegality, therefore, has the burden of showing unreasonableness of undue hardship[79] in a suit by the employer to enforce a covenant.[80] If the employee fails to meet this burden, the restraint will be enforced.[81] The covenant in *Bettinger* prevented the ex-employee from competing with his former employer in the temporary-help business for one year within the city limits of Philadelphia. Among a number of considerations in determining reasonableness, the court found of significant importance the nature of the business involved in the restriction.[82] Because of the close personal contact between employees and customers, an ex-employee allowed to compete could siphon off a substantial number of his former employer's customers. Similarly, in other cases involving personal contact, the courts have generally

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838, 846 (1957); *see* RESTATEMENT OF CONTRACTS § 515(b), comment *b* at 989 (1932).

74. Alexander & Alexander, Inc. v. Drayton, 378 F. Supp. 824, 829 (E.D. Pa. 1974); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 631-32, 136 A.2d 838, 846 (1957).

75. Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 454, 235 A.2d 612, 621 (1967).

76. Pennsylvania Funds Corp. v. Vogel, 399 Pa. 1, 159 A.2d 472 (1960); Hanlon v. Morrissey, 30 North. 282, 58 Pa. D. & C. 133 (C.P. 1946).

77. Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967); *see* Piercing Pagoda, Inc. v. Hoffner, — Pa. —, 351 A.2d 207 (1976).

78. 455 Pa. 100, 314 A.2d 296 (1974).

79. Seligman & Latz v. Vernillo, 382 Pa. 161, 114 A.2d 672 (1955); Plunkett Chem. Co. v. Reeve, 373 Pa. 513, 95 A.2d 925 (1953); Harris Calorific Co. v. Marra, 345 Pa. 464, 29 A.2d 64 (1942); Sklaroff v. Sklaroff, 263 Pa. 421, 106 A. 793 (1919); Harbison-Walker Refrac. Co. v. Stanton, 227 Pa. 55, 75 A. 988 (1910).

80. The suit must be timely. In Greencastle Livestock Mkt., Inc. v. Knauff, 3 Pa. D. & C.2d 333 (C.P. Frank. 1951), the employer knew that defendant had breached, yet conducted business with him for two years. Plaintiff was estopped by waiver from enforcing the covenant and his delay of three years in bringing suit constituted laches.

81. Harris Calorific Co. v. Marra, 345 Pa. 464, 468, 29 A.2d 64, 67 (1948); *see* Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 103, 314 A.2d 296, 298 (1974).

82. Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 104, 314 A.2d 296, 298 (1974); Standard Print. Co. v. Procopio, 37 North. 60 (Pa. C.P. 1964); Hanlon v. Morrissey, 30 North. 282, 58 Pa. D. & C. 133 (C.P. 1946); Mascaro v. Ricci, 56 Montg. 378 (Pa. C.P. 1940).

upheld restrictions on competition as necessary to protect the employer.[83]

A court also will consider the effect of the restriction's enforcement on the employee.[84] If the scope or duration of the covenant is so excessive that the employee is deprived of the opportunity to make a living or support his family, the restraint is prima facie unreasonable and unenforceable.[85] If enforcement will not prevent the employee from earning a living in areas with which he is familiar, however, the restraint will be deemed reasonable.[86] In *Bettinger*, despite enforcement, the employee was free to pursue several familiar sales areas, and therefore, no undue hardship was proven.

Finally and most importantly, the restrictions must be capable of precise delineation by a court. When both the duration and geographical area are stated specifically in the covenant, courts have shown a greater willingness to uphold it.[87] The employee in *Bettin-*

83. Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 104, 314 A.2d 296, 298 (1974); *see* Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967). *But see* notes 114-128 and accompanying text *infra*.

84. Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 104, 314 A.2d 296, 298 (1974).

85. *See, e.g.*, Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 314 A.2d 287 (1974).

86. Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 104, 314 A.2d 296, 298 (1974).

87. The courts have held the following restrictions reasonable although the covenant may have been invalidated for other reasons: Piercing Pagoda, Inc. v. Hoffner, — Pa. —, 351 A.2d 207 (1976) (three years, thirty miles); Maintenance Spec., Inc. v. Gottus, 455 Pa. 329, 314 A.2d 279 (1974) (two years, company territory); Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 314 A.2d 296 (1974) (two years, fifty miles); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967) (two years, area one salesman could cover); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967) (three years, six air miles); Beneficial Fin. Co. v. Becker, 422 Pa. 531, 222 A.2d 873 (1966) (three years); Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 206 A.2d 59 (1965) (five years, entire state); Pennsylvania Funds Corp. v. Vogel, 399 Pa. 1, 159 A.2d 472 (1960) (two years, entire state); Seligman & Latz v. Vernillo, 382 Pa. 161, 114 A.2d 672 (1955) (one year, one mile); Harbison-Walker Refrac. Co. v. Stanton, 227 Pa. 55, 75 A. 988 (1910) (fifteen years, five states); Ross v. Houck, 184 Pa. Super. 448, 136 A.2d 160 (1957) (five years, three miles); Papercraft Co. v. Prescher, 121 Pitts. L.J. 71 (Pa. C.P. Alleg. 1972) (three years); L.G. Balfour Co. v. Burkes, 118 Pitts. L.J. 372 (Pa. C.P. Alleg. 1970) (two years, employee's former sales territory); W.G.A.L., Inc. v. Wolf, 83 York 45 (Pa. C.P. 1969) (one year, thirty-five miles); Strayer-Beitzel of York, Inc. v. Mehl, 82 York 133 (Pa. C.P. 1968) (five years, entire state); Berks Packing Co. v. Landis, 47 Pa. D. & C.2d 395 (C.P. Berks 1968) (two years, former service territory); Sales Consult., Inc. v. Pollock, 116 Pitts. L.J. 118 (Pa. C.P. Alleg. 1967) (nine months, city of Pittsburgh); Chambersburg Broadcasting Co. v. Foreman, 14 Cumb. 100 (Pa. C.P. Frank 1962) (three years, fifteen miles); Yetter v. Dunn, 78 Montg. 16 (Pa. C.P. 1961) (one year, three miles); Fatzinger v. DeLong, 10 Pa. D. & C.2d 53 (C.P. Leh. 1957) (three years, twenty-five miles); Amish Village, Inc. v. Neuber, 75 Pa.

ger was precluded for one year from competing with his former employer within the city of Philadelphia. The court probably reasoned that the one-year limitation was the minimum duration necessary to afford any actual protection to the employer and that the geographical scope of the restraint was entirely reasonable since it afforded the employee an opportunity to do business in the suburbs.

2. Reasonable Limits Found by Implication.—If a covenant has no time limitation but encompasses a limited geographical area, the agreement is prima facie valid[88] and the burden is still upon the party asserting illegality to prove the restraint's unreasonableness.[89] This is also true when a restriction is limited in time but unlimited in scope.[90] If a restrictive covenant is limited in neither duration nor scope, however, the overwhelming weight of authority in Pennsylvania holds that the restraint is void.[91] Enforcement is impossible because no accurate delineation of the restriction is possible. No standards exist to determine if a breach has occurred or to evaluate the employer's interest. Undoubtedly an undue hardship is placed on the ex-employee by an open-ended restrictive covenant.[92] Absent limits allowing a court to measure reasonableness, enforcement should be withheld in every case.

D. & C. 323 (C.P. Lanc. 1950) (five years, same county); Berkowitz v. Ronay, 31 Wash. 20 (Pa. C.P. 1950) (one year, fifty miles); Niedland v. Kulka, 64 Pa. D. & C. 418 (C.P. Montg. 1948) (two years, twenty-five miles); Easton Laundries v. Smith, 26 North. 324 (Pa. C.P. 1938) (one year, former territory); Grand Union Tea Co. v. Puras, 23 Lack. 278 (Pa. C.P. 1922) (six months, former territory). *But see* Protect Alarms, Inc. v. Ernst, 48 Pa. D. & C.2d 413 (C.P. Leh. 1969) (three years, thirty miles held unreasonable); Histand v. Nagorski, 37 Pa. D. & C.2d 157 (C.P. Bucks 1963) (ten years held unreasonable); Musser v. Bummer, 54 Lanc. 227 (Pa. C.P. 1954) (five years held unreasonable); Lewis v. Wimberly, 76 Pitts. L.J. 513 (Pa. C.P. Alleg. 1928) (two years, company's business territory held unreasonable).

88. Harris Calorific Co. v. Marra, 345 Pa. 464, 29 A.2d 64 (1942); Sklaroff v. Sklaroff, 263 Pa. 421, 106 A. 793 (1919); Hobensack v. McLean, 86 Pa. D. & C. 482 (C.P. Bucks 1953); Hanlon v. Morrissey, 30 North. 282, 58 Pa. D. & C. 133 (C.P. 1946); Fritz v. Bitler, 26 Schuy. 1 (Pa. C.P. 1928).

89. Sklaroff v. Sklaroff, 263 Pa. 421, 425, 106 A. 793, 794 (1919).

90. When an agreement contains no limitation on the area covered or, alternatively, contains no time limitation, courts will sustain the contract if in view of the circumstances it can be given a reasonable interpretation. Seligman & Latz v. Vernillo, 382 Pa. 161, 165, 114 A.2d 672, 674 (1955); *see* Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 257, 314 A.2d 287, 295 (1974) (Eagen, J., concurring); Plunkett Chem. Co. v. Reeve, 373 Pa. 513, 516, 95 A.2d 925, 926 (1953); Harris Calorific Co. v. Marra, 345 Pa. 464, 469, 29 A.2d 64, 67 (1942). *Compare* F.G. Okie, Inc. v. Attaway, 31 Pa. D. & C.2d 173 (C.P. Montg. 1962), *with* Greystone Uphol. Corp. v. Lehigh Shops, Inc., 30 Leh. 106 (Pa. C.P. 1962). *See also* 14 S. WILLISTON, LAW OF CONTRACTS § 1639 (3d ed. W. Jaeger 1972).

91. Reading Aviation Serv. v. Bertolet, 454 Pa. 488, 491, 311 A.2d 628, 630 (1973); Henschke v. Moore, 257 Pa. 196, 101 A. 308 (1917); Pittsburgh Brass Co. v. Adler, 2 Mona. 235 (Pa. 1889); Taylor v. Saurman, 110 Pa. 3, 1 A. 40 (1885); Keeler v. Taylor, 53 Pa. 467 (1866). *Contra*, Brajkovic v. Abrashoff, 15 Dauph. 10 (Pa. C.P. 1911).

92. Reading Aviation Serv., Inc. v. Bertolet, 454 Pa. 488, 492, 311 A.2d 628, 630 (1973). For text of the restriction *see* note 108 *infra*.

The restrictive covenant in *Trilog Associates, Inc. v. Famularo*,[93] for example, which was agreed upon in 1967, prohibited employee Famularo from "developing or assisting in the development or exploitation of any shareholders' record system on his account or for any other party" until March 2, 1972.[94] Employees Marabella and Gawry were similarly prohibited

> from coming under the employ of any customer or client of Trilog or of any business or individual with which the employee had come into contact or acquaintance through his employment with Trilog for a period of two years after leaving the employ of Trilog.[95]

The court held both restrictions void because they were neither limited in their territorial application nor capable of reasonable interpretation. A reasonable scope was impossible to discern in the restraint on Famularo. Although the restraint was limited in time, the employee met his burden of showing unreasonableness.[96] He was precluded from practicing his profession *anywhere for anyone.* This covenant was patently oppressive because it had no relationship to any valid interest of the former employer.[97] The same reasoning was applied to invalidate the covenants executed by Marabella and Gawry. They were prevented from entering into the employ of *any* competitor of Trilog in *any* capacity and in *any* place. A covenant must cover only employment related to the work the ex-employee performed for his former employer.[98]

The Supreme Court of Pennsylvania concluded in *Henschke v. Moore*[99] that a covenant that was unlimited in time and attempted to encompass the entire United States was an unreasonable restraint of trade. At the time the distinction between general and partial restraints of trade was based largely on geographical considerations.[100]

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93. 455 Pa. 243, 314 A.2d 287 (1974).
94. *Id.* at 248, 314 A.2d at 291.
95. *Id.* at 253-54, 314 A.2d at 293.
96. *See* note 90 and accompanying text *supra.*
97. 455 Pa. at 254, 314 A.2d at 293; *see* Reading Aviation Serv. v. Bertolet, 454 Pa. 488, 311 A.2d 628 (1973); Beneficial Fin. Co. v. Becker, 422 Pa. 531, 534 n.3, 222 A.2d 873, 875 n.3 (1966).
98. Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 255, 314 A.2d 287, 294 (1974). Justice Manderino illustrated the extensive nature of the restriction:

> It *bars* Marabella and Gawry from accepting employment as bartenders in Ireland from the father of the sister-in-law of the aunt of the elevator operator whom Marabella and Gawry happen to meet in a bar in Scranton while on Trilog's business.

Id. at 256, 314 A.2d at 294.
99. 257 Pa. 196, 101 A. 308 (1917).
100. *See* notes 7-9 and accompanying text *supra.*

Thus, for many years *Henschke* stood for the proposition that a restrictive covenant that encompassed the entire country was unreasonable as a matter of law. The same court reversed itself, however, in 1963 in *Alabama Binder & Chemical Corp. v. Pennsylvania Industrial Chemical Corp.*[101] The restrictive covenant in *Alabama Binder* had a five-year duration and precluded the employee from associating with any of his former employer's competitors. Alabama Binder had a limited number of competitors in the binder and plasticizer market, all of which distributed their products nationwide. Thus, the restriction had a direct, reasonable relationship to a valid interest of the employer and was enforceable.

In summary, no rigid test of the reasonableness of restrictive covenants exists. A case-by-case analysis is necessary, in which, *inter alia*, the character of the business involved and the relative needs of the employer and employee are important. So long as a restrictive covenant contains reasonable limits, either express or implied, on its duration and geographical scope, it will be enforced.

3. Partial Enforcement of Restrictive Covenants.—A restrictive covenant found excessive in geographical scope or duration can be partially enforced. Pennsylvania courts will limit the restriction to reasonable geographical and temporal boundaries according to the realities of the situation[102] if the limitations are inherently divisible.[103]

> Where a county, or city or borough is named as a limit, and an unreasonable extent of territory in addition is also named, the covenant is divisible, and may be valid as to the particular place which is a reasonable limit.[104]

This capacity to modify contract terms has been called by Justice

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101. 410 Pa. 214, 189 A.2d 180 (1963).

102. Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 225, 206 A.2d 59, 60 (1965).

103. Alexander & Alexander, Inc. v. Drayton, 378 F. Supp. 824 (E.D. Pa. 1974); Sidco Paper Co. v. Aaron, — Pa. —, 351 A.2d 250 (1976); Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 314 A.2d 296 (1974); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967); Albee Homes, Inc. v. Caddie Homes, Inc., 417 Pa. 177, 207 A.2d 768 (1965); Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 206 A.2d 59 (1965); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957); Seligman & Latz v. Vernillo, 382 Pa. 161, 104 A.2d 672 (1955); Plunkett Chem. Co. v. Reeve, 373 Pa. 513, 95 A.2d 925 (1953); Harris Calorific Co. v. Marra, 345 Pa. 464, 29 A.2d 64 (1943); Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088 (1904); Couchara v. Wonland, 71 Montg. 367 (Pa. C.P. 1955); *see* RESTATEMENT OF CONTRACTS §§ 515 (a)-(b), 518 (1932).

> Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms, would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.

Id. at § 518.

104. Smith's Appeal, 113 Pa. 579, 590, 6 A. 251, 253 (1886).

Musmanno "the unique virtue of equity . . . to rehabilitate wrecked principles."[105]

In *Barb-Lee Mobile Frame Co. v. Hoot*[106] the restrictive covenant contained a five-year prohibition against competition with the employer in Pennsylvania, New Jersey, and Delaware. A lower court's modification of the geographical scope to Pennsylvania was affirmed by the supreme court. Because the bulk of the employer's business was performed within Pennsylvania, restraining competition within the Commonwealth was all that was reasonably necessary for his protection. In *Reading Aviation Service v. Bertolet*,[107] however, the court refused to enforce any part of an excessively broad restrictive covenant.[108] Justice Pomeroy, writing for the majority, relied on the *Restatement of Contracts*[109] to support the court's refusal to modify the indivisible and open-ended restriction.

> The objection to such a practice is that it tends to encourage employers possessing superior bargaining power over that of their employees . . . to insist upon unreasonable and excessive restrictions secure in the knowledge that the promise may be upheld in part, if not in full.[110]

The difference in these cases is the delineation of the restriction's geographical scope in *Barb-Lee*. It contained distinct and, therefore, divisible political and geographical areas, which enabled the court to make a reasonable and practical modification. The covenant in *Reading Aviation*, on the other hand, contained no limitations. Any attempt to enforce part of the restriction would have required a rewriting of the agreement.[111]

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105. Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 224, 206 A.2d 59, 60 (1965).

106. 416 Pa. 222, 206 A.2d 59 (1965); *accord*, Bahleda v. Hankison Corp., 228 Pa. Super. 153, 232 A.2d 121 (1974).

107. 454 Pa. 488, 311 A.2d 628 (1973).

108. The restrictive covenant read as follows:

> In connection with my employment by you, I hereby agree that so long as I am an officer, director, employee, or am otherwise active in your business, I will not own any interest in, or engage in any way, directly or indirectly, in any business competitive with you, or any of your subsidiaries, or solicit or in any other manner or way assist any such competitive business after I have voluntarily ceased to be an officer, director, employee or otherwise active in your business or any of your subsidiaries.

109. RESTATEMENT OF CONTRACTS § 518 (1932); *see* note 103 *supra*.

110. 454 Pa. at 493, 311 A.2d at 630; *see* 14 S. WILLISTON, LAW OF CONTRACTS § 1647c (3d ed. W. Jaeger 1972).

111. In Sidco Paper Co. v. Aaron, — Pa. —, —, 351 A.2d 250, 257 (1976), the court referred to the covenant in *Reading Aviation*:

> This sort of gratuitous overbreadth militates against enforcement because it indicates an intent to oppress the employee and/or to foster a monopoly

The best example of the operation of the equitable tool of partial enforcement is *Alexander & Alexander, Inc. v. Drayton*,[112] in which the District Court for the Eastern District of Pennsylvania modified *both* the duration and geographical limit of a restrictive covenant. The covenant contained a ten-year prohibition against competition with the employer, an insurance brokerage firm, within one hundred miles of the city limits of Philadelphia, Boston, New York, and any city in which Drayton had been employed within the three years immediately preceding termination of employment. The court, while noting that the restriction was reasonable and necessary at the time it was executed some seven years earlier, felt compelled to employ a different perspective in gauging its reasonableness at the time of suit.[113] Drayton was fifty-two years old and, if the restriction had been enforced for its entire ten-year duration, he probably would have been too close to retirement age to start a new career. Judge Higginbotham also took notice that the insurance policies involved were often renewed annually and that Drayton's business activity was quite limited in the Boston area. To protect the employer's interests without imposing an undue hardship on Drayton, the court modified and partially enforced the restrictive covenant to prevent him from competing for two years within one hundred miles of Philadelphia.

Although not free from controversy, the prerequisites of valid restrictive covenants are clear. The restraints must be reasonable, adequately delineated in geographical scope and duration, closely related to a valid interest of the employer, and sufficiently clear to allow partial enforcement by the judiciary.

D. Specialized Training and Personal Contacts

An employee often develops close personal contacts with his employer's customers, some of whom will transfer their business to a competing ex-employee. As a result, Pennslyvania courts for many years consistently held that an employee need not receive any specialized training to allow enforcement of a restrictive covenant.[114] Presence or absence of specialized training was merely another fact to be

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either of which is an illegitimate purpose. An employer who extracts a covenant in furtherance of such a purpose comes to the court of equity with unclean hands and is, therefore, not entitled to equitable enforcement of the covenant.

112. 378 F. Supp. 824 (E.D. Pa. 1974).

113. *Id.* at 831; the court in *Sidco Paper Co. v. Aaron* adopted the same approach by determining the reasonableness of the restriction, as modified by the lower court, as of the time of suit. *Id.* at —, 351 A.2d at 257.

114. Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 314 A.2d 296 (1974); Jacobson & Co. v. International Envir. Corp., 427 Pa. 439, 235 A.2d 612 (1967); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967); A.J. Cole & Co. v. Field, 95 Dauph. 454 (Pa. C.P. 1973); Lemoyne Sleeper Co. v. Bolger, 94 Dauph. 19 (Pa. C.P. 1971); Sales Consult., Inc. v. Pollock, 116 Pitts. L.J. 118 (Pa. C.P. Alleg. 1967). *But see* Ginsberg v. Jones, 49 Del. 39 (Pa. C.P. 1961).

considered by the court, not itself controlling.[115] For example, in *Jacobson & Co. v. International Environment Corp.*[116] the chancellor found that the employee had received no special training from Jacobson or any insight into its business. The restrictive covenant was enforced by the Supreme Court of Pennsylvania without dissent, however, because the "close personal contact of the sales representatives with prospective buyers was critical to the success of the business."[117]

The solidity of this point of law, on the other hand, has been undermined by *Girard Investment Co. v. Bello.*[118] The requisite personal contacts deemed so important in *Jacobson* were undisputed in this case. Bello had been branch manager of one of plaintiff's banks. Because of the personal nature of the business, Girard's president admitted that borrowers tended to follow branch managers when they moved. In fact, Bello testified that many of his loan customers were drawn from his circle of friends and acquaintances. Nevertheless, the supreme court, apparently rejecting prior case law, refused to enforce the restrictive covenant because no evidence that the employee had received specialized training or learned trade secrets or that Girard had suffered undue hardship from Bello's cessation of employment was introduced.[119]

Construction of a passage in *Morgan's Home Equipment Corp. v. Martucci*[120] is the key to the court's apparent break with precedent in *Girard*:

> An employee *may* receive specialized training and skills, and learn the carefully guarded methods of doing business which are trade secrets of a particular enterprise. To prevent an employee from utilizing such training and information in competition with his former employer . . . restrictive covenants . . . are enforced by the courts as reasonably necessary for the protection of the employer.[121]

The *Girard* majority, although not expressly requiring specialized training, stated that it had considered all possible justifications for the restriction, including the elements listed in *Martucci*, and had discov-

115. Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 631, 136 A.2d 838, 846 (1957).
116. 427 Pa. 439, 235 A.2d 612 (1967).
117. *Id.* at 453, 235 A.2d at 620.
118. 456 Pa. 220, 318 A.2d 718 (1974).
119. *Id.* at 223-24, 318 A.2d at 720.
120. 390 Pa. 618, 136 A.2d 838 (1957).
121. *Id.* at 631, 136 A.2d at 846 (emphasis added).

ered no persuasive ones.[122] Thus, personal contacts that enabled the ex-employee to attract a substantial number of his former employer's customers were not sufficient to warrant enforcement of the restrictive covenant.

Justice Pomeroy vigorously dissented,[123] asserting his support for the rationale of *Jacobson & Co. v. International Environment Corp.*[124] and his belief that *Girard* represented a marked and unjustified departure from precedent.[125] His dissent may have influenced the supreme court, for in *Sidco Paper Co. v. Aaron*[126] the Court appears to qualify the specialized training requirement of *Girard.* Close personal contacts existed between employee Aaron and customers of Sidco. Upon terminating his employment, Aaron entered into successful competition with his former employer; in the month after Aaron quit, Sidco's business fell from four hundred ninety thousand to ninety thousand dollars. The supreme court affirmed the lower court's grant of a preliminary injunction enforcing the covenant and reaffirmed the holdings of the cases that Justice Pomeroy had found irreconcilable with *Girard.*[127]

Sidco is a practical solution to the situation in which an employee does not receive specialized training, but would be able to divert a substantial number of his employer's customers if he were allowed to compete. Good will is a legally cognizable interest and a proper subject for a restrictive covenant. The employer's need for protection may exist regardless of any specialized training of the employee. Although *Girard* is operative when enforcement of a covenant not to compete is warranted by an employee's specialized or advanced training, the case is not the final word. *Sidco,* by not requiring a showing of specialized training, illustrates a proper and practical balancing of the needs of employees and employers.[128] In addition, the court in *Sidco* realized that significant economic harm can be inflicted upon an employer by a nonspecialist employee.

III. Remedies

A. Injunction

The primary remedy available to an employer seeking to prevent

122. Girard Inv. Co. v. Bello, 456 Pa. 220, 224 n.2, 318 A.2d 718, 720 n.2 (1974); *see* RESTATEMENT OF CONTRACTS § 516(f), comment *h* at 1001 (1932).

123. 456 Pa. at 224, 318 A.2d at 720.

124. 427 Pa. 439, 235 A.2d 612 (1967).

125. "In my view neither *Bettinger,* nor *Jacobson,* nor *Hayes* can be reconciled with the result the court reaches today." 456 Pa. at 229, 318 A.2d at 723 (Pomeroy, J., dissenting).

126. — Pa. —, 351 A.2d 250 (1976).

127. *See* — Pa. at —, 351 A.2d at 258 (Pomeroy, J., concurring).

128. Girard Inv. Co. v. Bello, 456 Pa. 220, 225, 318 A.2d 718, 721 (1974) (Pomeroy, J., dissenting); *see* note 125 *supra.*

a former employee from violating a restrictive covenant is injunctive relief. In every case in which a restraint was upheld an injunction was issued to enjoin the employee from competing with his former employer for the duration of the restraint and to enjoin any prospective employer in competition with the plaintiff from hiring the employee.[129]

The injunctive process is uniquely effective against the practices sought to be prevented by restrictive covenants. Remedies at law are inadequate to compensate for the harm wrought by illegal competition. Customers once lost often remain lost to the employer. Trade secrets once divulged are secrets no longer. Such damage cannot be calculated in monetary terms.[130] Pending the outcome of litigation, employers often seek preliminary injunctions against their ex-employees. The prerequisites for issuance of a preliminary injunction are (1) a threat of immediate and irreparable harm that cannot be compensated by damages, (2) a likelihood that greater injury will result from refusal of the injunction than its issuance, and (3) an ability to restore the status quo that existed immediately prior to the alleged misconduct.[131] A determination that the activity sought to be restrained is actionable and that an injunction is reasonably suited to abate the activity is also required. Unless the contract right is clear and the wrong manifest, a preliminary injunction generally will not be issued to restrain an employee from violating his covenant.[132]

Although an injunction usually is issued only upon a showing of irreparable harm, the standard is somewhat different when the court is concerned with a restrictive covenant in an employment contract. The essential determination in this situation is whether the covenant is reasonable.[133] A typical case is *Pennsylvania Funds Corp. v. Vogel*,[134] in which an injunction was sought to restrain a former employee's competition in the mutual fund business. In addition, the

129. Cases cited note 87 *supra*.
130. Papercraft Corp. v. Prescher, 121 Pitts. L.J. 71, 77 (Pa. C.P. Alleg. 1972).
131. Albee Homes, Inc. v. Caddie Homes, Inc., 417 Pa. 177, 181, 207 A.2d 768, 770 (1965); Alabama Binder & Chem. Corp. v. Pennsylvania Indus. Chem. Corp., 410 Pa. 214, 220-21, 189 A.2d 180, 181 (1963); *see* Sidco Paper Co. v. Aaron, — Pa. —, —, 351 A.2d 250, 257 (1976).
132. Albee Homes, Inc. v. Caddie Homes, Inc., 417 Pa. 177, 181, 207 A.2d 768, 770 (1965); Keystone Guild, Inc. v. Pappas, 399 Pa. 46, 159 A.2d 681 (1960); Herman v. Dixon, 393 Pa. 33, 141 A.2d 576 (1958).
133. Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 103, 314 A.2d 296, 298 (1974).
134. 399 Pa. 1, 159 A.2d 472 (1960).

ex-employee had enticed fourteen men trained and employed by Pennsylvania Funds to accept employment with him. The court granted the injunction, noting that Pennsylvania Funds had expended considerable sums of money and time in creating good will and in maintaining an extensive and continuous training program for its employees. The injunction prohibited defendant from selling mutual fund shares not only to customers or prospective customers of the employer at the time of Vogel's employment, but also to the public-at-large in Pennsylvania.

The ability of an employer to obtain an injunction, however, is not unlimited. In *National Merchandising Corp. v. Scope, Inc.*[135] defendant employee, after terminating his employment with plaintiff, established his own business in violation of a restrictive covenant. The employer sought an injunction against both the ex-employee and Scope, Inc., a firm selling commodities to defendant. The court refused to issue an injunction against Scope because no employer-employee relationship existed between defendant and Scope. An attempt to enjoin a third party extraneous to a restrictive covenant will be denied as a restraint on trade.[136] Even the injunction granted in *Vogel* had its limitations. The employer petitioned for an order directing defendant to sever his contractual relationships with all former employees of plaintiff, but defendant refused. The covenant covered only the sale of mutual funds and certain plans. The primary remedy of preventing direct competition could be achieved without an unwarranted limitation of the ex-employee's right to contract and do business outside the covenant's scope.[137]

B. Damages

Often a restrictive covenant will provide for forfeiture of a specified sum of money by the party violating the covenant. In *Bettinger v. Carl Berke Associates, Inc.*[138] the restrictive covenant required forfeiture of all commissions due the employee if he breached the covenant. The restrictive covenant in *Alexander & Alexander, Inc. v. Drayton*[139] mandated discontinuance of the employee's termination payments upon breach of the restraint. In both cases the employees contended that forfeiture was the employer's sole remedy and in both cases the court rejected the contention and awarded an injunction *in addition to* damages.[140] This is the proper result because the em-

135. 52 Luz. 299 (Pa. C.P. 1962).
136. *Id.* at 301.
137. Pennsylvania Funds Corp. v. Vogel, 399 Pa. 1, 9, 159 A.2d 472, 476 (1960).
138. 455 Pa. 100, 314 A.2d 296 (1974).
139. 378 F. Supp. 824 (E.D. Pa. 1974).
140. *See* RESTATEMENT OF CONTRACTS §§ 378, 384(2) (1932).

ployer is not protected from the employee's competition by damages alone.[141] A substantial sum of liquidated damages will not be considered a penalty since it is often impossible for the employer to determine the number of customers and the amount of profit lost to the defendant.[142] A rather complete remedy was afforded plaintiff in *Jacobson & Co. v. International Environment Corp.*[143] In addition to a permanent injunction for the duration of the covenant, the court ordered an accounting of the breaching ex-employee's salary since entering competition and an accounting of the profits IEC gained from its participation in the willful breach of the restrictive covenant.

Some Pennsylvania decisions, on the other hand, have refused to award damages in addition to injunctive relief. These cases hold it unduly harsh for an ex-employee to suffer an out-of-pocket loss plus the economic loss that normally accompanies a restrictive covenant. The courts in *Srolowitz v. Roseman*[144] and *Caporaso v. Bornstein*[145] awarded injunctive relief, but refused claims for liquidated damages of five hundred and one thousand dollars. Both courts characterized the damage provisions of the restrictive covenants as penalties[146] and rejected them without extensive comment. Their probable reasoning was that the liquidated damages bore no reasonable relation to the employer's injury. If this hypothesis is correct, these cases are not contrary to the Pennsylvania position, which is consistent with the modern trend of fully compensating the victim of a breach of contract,[147] that monetary damages are allowable upon a breach when they are reasonably related to the injury.[148]

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141. Piercing Pagoda, Inc. v. Hoffner, — Pa. —, 351 A.2d 207 (1976) (accounting ordered); Bettinger v. Carl Berke Assoc., Inc., 455 Pa. 100, 314 A.2d 296 (1974); Roth v. Hartl, 365 Pa. 428, 75 A.2d 583 (1950); Vogelbacher v. Tennant, 18 Lack. 248 (Pa. C.P. 1917) (damages allowed); Simmonds v. Callaghan, 7 Berks 49, 28 York 142 (Pa. C.P. 1914) (bond forfeited).

142. Beneficial Fin. Co. v. Becker, 11 Leb. 36, 44 (Pa. C.P. 1965), *aff'd*, 422 Pa. 531, 222 A.2d 873 (1966) ($2,000).

143. 427 Pa. 439, 235 A.2d 612 (1967); *see* Piercing Pagoda, Inc. v. Hoffner, — Pa. —, 351 A.2d 207 (1976).

144. 263 Pa. 588, 107 A. 322 (1919).

145. 39 Pa. County Ct. 600 (C.P. North. 1911).

146. *See* RESTATEMENT OF CONTRACTS § 339 (1932).

147. The supreme court recently stated in Piercing Pagoda, Inc. v. Hoffner, — Pa. —, —, 351 A.2d 207, 213 (1976),

> 148. Where equity assumes jurisdiction for one or more purposes, it will retain jurisdiction for all purposes to give complete relief and do complete justice between the parties. This may include an award of equitable relief not covered by the original prayer.

See Beneficial Fin. Co. v. Becker, 11 Leb. 36 (Pa. C.P. 1965), *aff'd*, 422 Pa. 531, 222 A.2d 873 (1966).

IV. Conclusion

The Pennsylvania courts have adopted a practical approach to the enforcement of restrictive covenants in employment contracts. Not hesitating to look beyond black letter law to the economic realities of each case, they have sought to strike a balance between protection of the employer's interest and avoidance of hardship on the employee. The courts have insured that restrictive covenants will not be used for illegitimate purposes or result in unconscionable effects, while making every attempt to enforce them in an equitable manner. Likewise, they have restricted application of covenants not to compete to only those employees whose competitive practices, if unleashed, could adversely effect an employer's business. In sum, Pennsylvania law on restrictive covenants guarantees that neither party will be the victim of injustice.

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